pellate court may well take judicial notice of the legislative proceedings. This is the rule of the United States Court, as laid down in New York Indians *v.* United States, supra, and is most consonant with sound reason.

As to the use of the history of a particular statute or constitutional provision for the purpose of determining the legislative intent, see Strawberry Hill, etc. *v.* Starbuck (Va.), 97 S. E. 362, 367, where the court examined the debates in the convention to get the meaning of § 170 of the Virginia Constitution. See also, Wayt *v.* Glasgow, 106 Va. 110, 55 S. E. 536; Connole *v.* Norfolk & W. Ry. Co. (U. S. D. C. Ohio), 216 Fed. 823, and cases there cited. And, in general, 36 Cyc. 1138-9.

D. N. SUTTON.

STATE CORPORATION COMMISSION.

IN RE APPLICATION AND SCHEDULE OF RATES FILED ON JULY 25, 1919, BY THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY.

1. Public Service Corporations—Regulations by State Corporation Commission.—The state has power to control and regulate all public service corporations. In Virginia this power is conferred by organic law upon the State Corporation Commission and the authority of this body is, by the Constitution, paramount.

2. Public Service Corporations—Regulations by State Corporation Commission.—Section 156 (b) of the Constitution of Virginia giving to the State Corporation Commission the power to supervise, regulate and control all transportation and transmission companies doing business in the state, and to prescribe rates and charges is self-executing and needs no enabling act of the legislature to put it into effect.

3. Public Service Corporations—Use of Streets—Consent of City—Nature of Consent.—Section 124 of the Constitution of Virginia, providing in effect that no public service company shall occupy the streets of a city without the previous consent of the corporate authorities gives to a city the power to impose such conditions, though arbitrary, as it might wish. This power is not, strictly speaking, a power of contract. The limitations are imposed by the city subject to regulation, supervision and alteration by the state.

4. Public Service Corporations—Franchise Granted by City—Rate Stipulation—Power to Alter.—A stipulation made by the city of Richmond with a telephone company in a franchise granted to its predecessor which fixed the rates to be charged by the company is not an irrevocable contract, but is subject to the reserved govern-

mental powers of the state as exercised through the State Corporation Commission.

5. **Public Service Corporations—Power to Regulate as Defined by Charter of City.**—The authority granted to the city of Richmond by its charter to impose conditions and regulations upon street railways is fuller and broader than the authority in regard to other public service corporations occupying the streets with their works.

6. **State Corporation Commission—Power to Require Refund of Excess Charges.**—The State Corporation Commission is not the proper tribunal to require a refund of excess charges over and above that claimed to be fixed by the franchise contract between city and a telephone company.

RHEA, CHAIRMAN. This case involves the jurisdiction of the State Corporation Commission to fix and regulate the rates to be charged by the petitioner, The Chesapeake and Potomac Telephone Company of Virginia, which will hereafter be referred to as such or as the company, for telephone rates of service within the corporate limits of the City of Richmond.

The company contends that this power resides with the Commission, while the city claims that under the Constitution and statutes of Virginia, the charter of the city and the terms of the franchise under which the company operates in the city, the rates to be charged for service within the city's territorial limits, has been established by contract between the city and the company, which contract is irrevocable without the consent of the city, during the franchise period.

The issue thus presented was precipitated by the Act of Congress of July 11th, 1919, by directing the return to the owners of all telegraph and telephone lines taken over by the Federal Government as a war measure, by authority of the Act of Congress of July 16th, 1918. During the period of Federal operation and control, rates for telephone service in the city of Richmond, by order of the Postmaster General, were materially increased over the rates of charge in force in the city prior to the assumption of control by the Federal authorities, and the Act of Congress of July 11th, 1919, after directing the return of the lines and systems as above set out, contained the following proviso:

"Provided, however, that the existing toll and exchange rates as established or approved by the Postmaster-General on or prior to June 16th, 1919, shall continue in force for a period not to exceed four months after this act takes effect, unless sooner modified or changed by the public authorities, state, municipal, or otherwise, having control or jurisdiction of tolls, charges and rates, or by contract or voluntary reduction."

Subsequent to the return of the company to its owners, the Council and Board of Aldermen of the city of Richmond, purporting to act under the authority of the proviso above quoted, passed a joint resolution re-establishing the schedule of rates agreed upon by the city and the company in the year 1901, when a franchise to the petitioner's predecessor in title was granted by the city, being the schedule of rates in effect in the city prior to the assumption of control by the Federal Government. It is the legality of this assumption of authority on the part of the city which is involved in this inquiry.

On the 25th day of July of this year, The Chesapeake and Potomac Telephone Company of Virginia, filed its petition asking for an increase in rates throughout the State, and upon the passage of the said resolution by the authorities of the city of Richmond, undertaking to re-establish the rates as they existed prior to the order of the Postmaster General, the company, by motion on its petition filed as aforesaid, asked for immediate consideration of said petition so far as the city of Richmond was concerned, and that it be allowed to continue the rates as fixed by the Postmaster General, pending the investigation by the Commission as to the reasonableness of its proposed increase in rates. Upon this motion the city was summoned to answer, and it appeared and filed its answer, denying the jurisdiction of the Commission, but asserting that its rights were fixed and fully protected by the contract when on October 15th, 1901, its franchise was granted to the predecessor of the present company. The question of the jurisdiction was ably and elaborately argued by counsel for the company and by the Assistant Attorney for the city of Richmond. In addition, lengthy arguments were made by brief on behalf of both the company and the city, and numerous authorities cited from this and other states. In our view, however, the necessary discussion of the question involved, although of vital importance, is confined to narrow limits.

[1] That the State has power to control and regulate all public service corporations "is no longer an open question in this country." It has been uniformly so held by the highest courts, both State and Federal. *Norfolk & Portsmouth Belt Line Railroad* v. *Commonwealth,* 103 Va. 289; *Winchester, etc., R. R.* v. *Commonwealth,* 106 Va. 264, 273; *Munn* v. *Illinois,* 94 U. S. 113; *Smith* v. *Ames,* 69 U. S. 466, and numerous other authorities. In our state this power has been conferred by the organic law, so far as the purposes of this case are concerned, upon the State Corporation Commission, and its authority therein declared to be paramount.

Section 156 (a) of the Constitution provides:

"Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government * * * through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State."

Section 156 (b) provides, in part, as follows:

"The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to this end the Commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classification of traffic and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. * * * The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws; provided, however that nothing in this section shall impair the right *which has heretofore been, or may hereafter be, conferred by law,* upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise."

[2] Section 153 of the Constitution defines telegraph and telephone companies to be transmission companies. Section 156 (b) of the Constitution is self executing and needed no enabling act of the legislature to put it into effect, and it has been so held by this Commission in fixing the rates of telegraph

companies when no statute existed with reference thereto, and it has been so held by our highest court in Norfolk & Portsmouth Belt Line Railroad Company *v.* Commonwealth, supra.

Indeed until the Constitution shall have been amended in the manner provided therein, the General Assembly is powerless to add to or take from the Commission its paramount authority to prescribe rates, charges and classifications of traffic for transportation and transmission companies, unless by authority of the saving clause of Section 156 (b) of the Constitution it has theretofore either expressly or by necessary implication conferred upon any city, county or town the authority to prescribe rules, regulations or rates of charge, or unless thereafter such rules, regulations or rates of charge are made in pursuance of Section 125 of the Constitution and in the manner provided in Sections 1033 (e) and 1033 (f) of Pollard's Code. Therefore, unless the city of Richmond can bring itself within the saving proviso above quoted and found at the end of Section 156 (b) of the Constitution its contention must be rejected and the jurisdiction of the Commission upheld. It is well to here repeat this proviso in a separate clause:

"Provided, however, that nothing in this section shall impair the right *which has heretofore been, or may hereafter be, conferred by law* upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise." (Italics supplied).

Now it will be noted that this proviso confers no authority whatever upon any city, town or county. It says that nothing in this Section (156b) shall impair the right *which has heretofore been or may hereafter be conferred by law* upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge, etc. It would seem to be perfectly clear that unless there had been theretofore conferred by law upon the city of Richmond the power "to prescribe rules, regulations or rates of charge" then it had no authority, certainly not to the extent of abrogating the inherent and sovereign power of the State, to fix just and reasonable rates to be charged by The Chesapeake and Potomac Telephone Company of Virginia in the city of Richmond whenever it deemed it proper to exercise that authority.

It is not contended that the Constitution prior to the present Constitution conferred any authority whatever with respect to rates.

In our view the issue here presented must be determined by the statute or charter law in force at the time the franchise was granted under which it is claimed that an irrevocable contract for the life of the franchise was made between the city and the telephone company. This contract was dated October 15th, 1901. The learned Assistant City Attorney in his brief says:

"In 1901 when the franchise was granted, it is true that the grant was made under authority given the city by its charter and by Section 1287 of the Code of 1887."

We quote below so much from the charter of the city of Richmond, as is pertinent to the inquiry here, as follows: "and no company shall occupy with its works the streets of the city without the consent of the council."

[3] Section 1287 of the Code of 1887, with reference to telegraph and telephone companies and giving them authority to construct and maintain their lines along the roads and other public places, provided "and along or over the streets of any city or town with the consent of the council thereof." So it will be seen that the provisions of the charter and the statute law existing at the time, were practically similar. Section 124 of the present Constitution and Section 1033 (d) of Pollard's Code, which is identical with Section 124 of the Constitution, and the charter of the town of Lexington were all in existence at the time the franchise was granted by the town of Lexington, which franchise was one of the subjects of investigation in Virginia-Western Power Company *v.* City of Clifton Forge, et als, 5 Va. Law Reg., N. S., 842, 18 Va. Appeals, 381, 99 S. E. 723. Section 124 of the Constitution provides:

"No street railway, gas, water, steam, or electric heating, electric light or power, cold storage, compressed air, viaduct, conduit, telephone, or bridge, company, nor any corporation, association, person or partnership, engaged in these or like enterprises, shall be permitted to use the streets, alleys, or public grounds of a city or town without the previous consent of the corporate authorities of such city or town."

Judge Sims, speaking for the court in the Virginia-Western Power Company cases, says:

"The provision of the charter of the town of Lexington quoted in the statement preceding this opinion goes no farther than Section 124 of the Constitution and Section 1033-d of the statute law aforesaid."

It will be seen that the provisions of Section 124 of the Constitution and Section 1033-d of the Code were to all intents and purposes the same as the provisions referred to in the charter of the city of Richmond and Section 1287 of the Code of 1887. Were these provisions sufficient to confer upon the city of Rich-

mond or any other municipality the absolute authority to conclude an unalterable contract as against the State in the exercise of its sovereign powers? Judge Sims, discussing the "consent" provision in Section 124 of the Constitution, says:

"Now Section 124 of the Constitution, and the statute (Sec. 1033-d) in the same language, undoubtedly confer upon municipalities the absolute power to prevent public utility corporations, such as the plaintiff in error company, from doing business within the municipality, by refusal of the consent mentioned therein. This power is absolute because no limitation is imposed upon it. Consequently the municipality may impose any condition it chooses upon its consent aforesaid, however unreasonable. It results from this that such power includes the power in municipalities to make a stipulation as to what the rate charges of the utility corporation shall be during the whole franchise period, as a condition upon which the consent aforesaid is given. (Here citing numerous cases.) That this was the intended effect of Section 124 of our Constitution is placed beyond all question by a reading of the debates on such section in the constitutional convention prior to its adoption. And such section of the Constitution is self-executory and needed no subsequent legislation to put it into effect. Moreover, it constitutes a limitation upon the legislative power and no subsequent legislation could take away or impair the absolute power aforesaid thus vested in municipalities. But such a power is not necessarily to be regarded as a power of contract. It is a power to impose conditions upon a consent of municipalities which they have the absolute right to withhold altogether or to grant subject to such conditions as they may arbitrarily impose, but it is not, strictly speaking, a power to contract. And, in view of the fundamental consideration aforesaid involved whenever the police power of the State is being surrendered, on principle, and in accordance with the greater weight of authority (Pond on Public Utilities, sections 510 to 523; Manitowoc *v.* Manitowoc, etc., R. Co., supra, [Wis.], 129 N. W. 925), it does not follow that because the power aforesaid has been thus conferred upon municipalities to make a stipulation as to what the rate charges aforesaid shall be as a condition upon which its consent aforesaid is given, that such stipulation shall be regarded as a *contract* which shall as such, control the amount of such charges for the future after the consent aforesaid is given and the public service is being performed. The contrary seems to be the prevailing view taken by the best considered authorities, and that we think it is the true view, unless a municipal power *to contract* is plainly expressed as conferred by some other constitutional ordinance or legislative enactment on

the subject. And, in the absence of such other plain expression, the continuing power of the State to supervise and regulate such rate charges for the future, to the end that they may be kept reasonable and just under changing conditions, will not be held to have been surrendered. Such continuing power, in such case, will be held to be reserved by the State; whether dormant or already conferred for its exercise upon some governmental agency of the State is immaterial. If dormant it may nevertheless be infused with life by appropriate legislation and put into operation at any time in the future. And, in such case, the initial rates fixed by the franchise as a condition upon the municipal consent aforesaid, will be taken to have been fixed subject to the reserved power of the State to regulate the rates in the future as the public welfare may demand and that status will be taken to have been so understood by the grantee as well as the grantor of the franchise. Therefore, upon the question before us, of whether the State irrevocably surrendered its power of future regulation of the rates named in the particular franchises involved, we must look to constitutional and legislative expressions on the subject other than those above considered."

It will therefore be seen that the mere consent provisions, such as we have quoted above, were held not to be sufficient, but that the court must look to constitutional and legislative expressions on the subject *other than those above mentioned.*

The court found those expressions in Section 125 of the Constitution and Sections 1033 (e) and 1033 (f) of Pollard's Code, the latter enacted in pursuance of Section 125 of the Constitution. This Section, 125, and Section 1033 (e) of the Code, which is practically identical with that of the Constitution, provide for the sale by municipalities of the right to use its streets by public utilities, and Section 1033 (f) provides the manner in which a city or town shall proceed to sell its franchise, and this Section, 125, and the sections of the Code last referred to, contain the only authority since the adoption of the present Constitution by which a municipality can make a binding and irrevocable contract for the franchise period so as not to exceed thirty years, and thereby deprive the State for the time being, from the exercise of its inherent police power to fix and regulate rates for all public service corporations, and therefore, and by virtue only of these provisions of the Constitution and statutes, did our Supreme Court of Appeals affirm the decision of this Commission in the Virginia-Western Power Company cases.

The learned Assistant City Attorney in his oral argument and in his brief, dangerously approaches a frank admission

that this contention has no merit unless he can be saved by the Constitutional and statute laws enacted since the city's contract was made, as stated, October 15th, 1901. The Commission is of opinion that neither the Constitutional or statute provisions relied on in behalf of the city have any legitimate bearing on the issue before us. As hereinbefore stated, the city must stand or fall upon the law as it existed at the date it claims to have made an irrevocable contract with the telephone company. Neither the Constitutional provisions nor the provisions of the statute referred to had any retroactive effect but were only prospective in operation, so far as the purposes of this case are concerned. See *Swift & Co. v. Newport News,* 105 Va. 108, and the cases there cited by Judge Cardwell. Lengthy arguments have been presented by counsel for both the company and the city as to the effect of the Acts of March 13th and March 27th, 1914, conferring certain powers on the Commission as to fixing rates of telephone companies and other public utilities, but all this is immaterial, said statutes having no application here whatever.

No subsequent statute can affect the paramount authority given the Commission by the Constitution over rates and charges of transportation and transmission companies unless made in pursuance of the proviso referred to in Section 156 (b) and Section 125 of the Constitution. The acts of 1914, as amended in 1918, above referred to, are not statutes undertaking to confer power upon cities or towns, but undertake to confer upon the Commission authority to fix and regulate the rates and charges of utility companies therein named.

[4] The Commission must conclude from an almost unbroken line of authorities from the highest courts of other States and of the United States, and more especially from the decision of our Supreme Court in the Virginia-Western Power Company cases, that the city of Richmond had no authority to enter into such an irrevocable contract as it claims to have made with the telephone company to the extent of extinguishing the reserved governmental power of the State, and the said contract must yield to the higher authority of the State when she wishes to exercise this authority.

The conclusion reached in this case is in accord with the decision of the Commission in the recent case of the Commonwealth, ex rel Davie *v.* Virginia Railway & Power Company, decided July, 1919, and also in accord with the policy of the State as declared in the opinion of the Supreme Court in the Virginia-Western Power Company cases, where it is stated:

"Especially is the power to regulate such rates considered, normally, to be a continuing power to meet changing conditions of the future which cannot be foreseen. A wise policy requires

that such power should, as a rule, be reserved unfettered, that it may be exercised in adjusting rates from time to time as may be fair and reasonable in the interest of the public midst, varying conditions as they arise. The longer the future period to be covered, the more imperative the need for such a safeguard, for the human vision of coming events is not far reaching. For short periods the fixing of rates by contract may be for the best interest of the public, but that method is not favored in the law. For this reason the abrogation of such continuing power is never to be presumed. The purpose on the part of the State to abrogate it or to authorize a municipality to abrogate it, even for a limited time, as for a term of years which may be covered by a franchise, is never to be assumed, for that is an extinguishment *pro tanto* of such continuing power of government.

This wise policy is declared in Sections 159 and 164 of the Constitution, which are as follows:

"Section 159. The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of corporations and subjecting them to public use, the same as the property of individuals, and the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well-being of the State."

"Section 164. The right of the Commonwealth, through such instrumentalities as it may select, to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor, shall never be surrendered nor abridged."

[5] It may be objected that this conclusion is at variance with the decision of the Commission affirmed by the Supreme Court of Appeals in the cases of the *Virginia Passenger & Power Company* v. *Commonwealth,* 103 Va. 644, and *Commonwealth* v. *Richmond & Rappahannock Railroad Company,* 115 Va. 756. Both of these cases involved franchises granted by the city of Richmond to street railway companies. In the first named case the railway company sought to be relieved of its agreement to sell labor tickets at a reduced rate and to issue transfers between connecting lines. It was held that the railway company had assumed contractural obligations with respect to the sale of labor tickets, and its petition was denied. In the second named case it was held that the city of Richmond had the right to modify a franchise agreement so as to relieve

the companies of the obligation of giving transfers. The precise question presented here was not raised in either of those cases, and if this be thought strange, the reason may be found by reference to the charter of the city of Richmond, Section 19 (i), which reads as follows:

"Section 19 (i). To authorize the laying down of railway tracks in the streets of the city and the running of cars thereon, under such conditions and regulations as they may prescribe and also from time to time to prescribe additional conditions and regulations as to the construction, reconstruction, repair, and maintenance of the tracks, roadbed, and cars, and the running of cars on such tracks."

It will thus be seen that the grant of authority here is much fuller and broader than the authority given in Section 1287 of the Code of 1887 or the charter of the city of Richmond with respect to other public service corporations occupying its streets with their works.

[6] This leaves only one question remaining. The learned Assistant City Attorney says that the rates fixed by the franchise contract of the company with the city of Richmond are the only lawful rates that the company had a right to charge from and after midnight July 31st, 1919, until this Commission gives the authority to change these rates, and that if the Commission assumes jurisdiction, any order entered by the Commission affecting said contract rates should also provide that the company be made to account for and reimburse its subscribers for the excess charge it has been making since July 31st, 1919, until the day on which the Commission enters the order.

We do not know of any statute or other authority, and we have not been referred to any, which confers upon the Commission the power to require a refund of excess charges over and above that claimed to be fixed by the franchise contract.

If the contract relied upon is a lawful one as between the city and the company, then the proper court would doubtless have jurisdiction and authority to give all proper remedies for a violation of the contract.

An order will be entered assuming jurisdiction in this case, and the motion of the company as to rates in the city of Richmond, will be heard along with its general application fixed for hearing at ten o'clock in the morning on the tenth of November next.

Commissioners Forward and Adams concur.